hereditary ranks, must, in the judgment of an English snob, be too low in the scale of civilization, to deserve to have its laws studied, or its constitutions understood. And hundreds of the profession, practising in courts in which the writings and opinions of Kent and Story are quoted with respect, have never troubled themselves to inquire, as to the constitution or character of the courts of whose learning and ability these were but fair exponents. We might draw further illustrations of the truth of what we have said, from the history of the late-renowned *Alexandra Case*, and the speeches in the House of Commons upon neutrality laws, as presented by the able criticisms of Mr. George Bemis, of Massachusetts, and others recently published. But our remarks have already become extended beyond their original design, and we content ourselves with the instance of Mr. Austin, one of the fairest and least prejudiced of English jurists, who have made our form of government the subject of comment when discussing jurisprudence as a science. E. W.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

LOCKHART & FREW *vs.* LICHTENTHALER.

1. Where a passenger on a car or vessel is injured by the concurrent negligence of his carrier and a third person, his remedy is solely against his carrier.

2. If however the negligence of the third party was the sole *proximate* cause of the injury, and there was negligence of the carrier only in a general sense, but which did not contribute to the injury, the third party is responsible.

3. Whether the defence of concurrent negligence can be heard without being specially pleaded, *quære.*

The opinion of the court was delivered by

THOMPSON, J.—This was an action against the defendants below, by the widow and children of John Lichtenthaler, under the Acts of Assembly of 1851–55, to recover damages for occasioning his death by negligence. The allegations in substance are, that the workmen or servants of the defendants in and about their business, so carelessly and negligently conducted themselves, in placing certain oil-casks so near the track of the Allegheny Valley Railroad, that a portion of the train of cars, on which the

deceased was at the time a passenger (in charge of the private property of his employers), was, by reason of striking the casks, thrown off the track and the deceased crushed to death.

To this charge the defendants pleaded *not guilty*, with leave to add, alter, or amend at bar, and gave evidence to show negligence on part of those in charge of the train of cars, in running at a dangerous rate of speed in view of the circumstances of the road at the time, and of the manner in which the train was made up.

It might be questionable whether such a defence as concurrent negligence in the agencies producing the death, if it be a defence at all, could be heard without being specially pleaded; but this objection was not interposed below nor here, and we will not consider it, in what we have now to say. Indeed, all question on this score was put out of the case, by the learned judge ruling, and afterwards charging, that if the disaster resulted either solely from the acts of the defendants through their servants, or concurrently with those in charge of the train, in either event the plaintiff would be entitled to recover.

This is a point not without difficulty. Wide differences of opinion appear between judges in England as well as the United States, in regard to it, some of which we propose to notice.

And in the outset, I may say, that measured by the preponderance of authority, I think the charge was clearly wrong. That preponderance as certainly proves that in cases of injury to a third person, arising from the *mutual negligence* of colliding carriages, trains, boats or vessels, the carrier vehicle, by which I mean, that on which the injured party is, must answer for the injury. I cannot doubt but that the deceased in the case in hand, as he was not a servant of the railroad company, must be considered in the light of a passenger, in charge of property being conveyed with himself by the railroad company for his employers. This raises the inquiry, whether the ruling and charge of the court below are correct as to the law of this case.

The first English case I find on the point is *Vanderplank* vs. *Miller*, 1 Mood. & Malk. 169, tried before Lord C. J. TENTERDEN, in 1828. It was for damage to goods on board of a vessel, occasioned by a collision. The owner of the goods sued the owners of the colliding vessel, and the defence set up was negligence on part of the carrying vessel also. His lordship charged, "that if there was want of care on both sides, the plaintiffs cannot

maintain their action. To enable them to do so, the accident must be attributable *entirely* to the fault of the crew of the defendants." This decision appears to have been acquiesced in, for it does not seem to have been carried further.

The same thing was ruled in the Court of Exchequer, in 1838, in *Bridge* vs. *The Grand Junction Railway*, 3 M. & W. 247, before Lord C. B. ABINGER, and Barons PARKE and BOLLAND. That was a suit for a personal injury. The plaintiff was a passenger on the Liverpool and Manchester train, and was injured by a collision between that and the train of the defendants. It is true the case finally went off on a question of pleading. But the question was whether the defendants' plea sufficiently raised the question of concurring negligence, and as it did not there was a recovery against the defendants. The doctrine that mutual negligence throws the responsibility on the carrying party, was fully admitted in the opinions of their Lordships.

The next cases which occur involving the question, are *Thorogood* vs. *Bryan* and *Catlin* vs. *Hills*, reported consecutively at pages 114 and 123, 65 Eng. Com. Law. The point was decided in 1849 in Common Bench, on rules for new trials. The former had been tried at Nisi Prius, before Sir CRESSWELL CRESSWELL, and the latter before WILLIAMS, J. The first was an action against the owner of an omnibus, for the negligence of his driver in killing a passenger alighting in the street from another omnibus. The other case was for an injury resulting to a passenger from a collision between the Thames River steamers, by which the plaintiff lost a leg. In both the non-carrying party was sued, and the defence was negligence on part of the carriers. The rules were separately argued on the same day. by different counsel, and held under advisement for some time. Opinions were delivered by the judges *seriatim*, on disposing of the motions, from which we extract pretty copiously.

COLTMAN, J., said: "The case of *Thorogood* vs. *Bryan* seems distinctly to raise the question, whether a passenger in an omnibus is to be considered so far identified with the owner, that the negligence on part of the owner or his servant is to be considered the negligence of the passenger himself. If I understand the law upon this subject it is this: that a party who sustains an injury from the careless or negligent driving of another, may maintain an action, unless he has himself been guilty of such negligence or want of care as to have conduced to the injury. In the

present case the negligence that is relied on as an excuse, is not the *personal negligence of the party injured*, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that having trusted the party, by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants, that if injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on part of the driver will be a defence of the owner of the carriage which directly caused the injury."

MAULE, J., said: "It is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost always brought against the rival carriage or vessel, which is only to be accounted for by the party-spirit which more or less enters into every transaction in life. If there is negligence on part of those who contract to carry the passenger, those who are injured have a clear and undoubted remedy against them." Short opinions were delivered by the other judges to the same effect.

At a subsequent day, when, as the report shows, the court were about to discharge the rule in *Catlin* vs. *Hills*, they were informed that the case had been compromised, and no order was made. The authority of *Bridge* vs. *The Grand Junction Railway* (*supra*) was cited and recognised in both cases.

The next English cases to be noticed are, *Rigby* vs. *Hewitt* and *Greenland* vs. *Chaplin*, determined in 1850, and consecutively reported like the last two in 5 Exchequer, 239–243. They seem opposed to the doctrines just cited. The opinion of C. B. POLLOCK is not very lucid, and although he seems to assert an opposite doctrine, yet the judgments in both cases were affirmed, while in one tried before Baron ROLFE, he certainly did lay down the rule, as held in the Common Pleas, at least in one of the aspects of the case. I think, however, the rule announced in the Exche-

quer stands opposed to the doctrine that concurrent negligence on part of the passenger's vehicle with that of the party sued is a defence. There is quite a similarity in the general features of these two cases and those in the Common Pleas. Both sets were argued together and reported consecutively in their respective reports. One case of each set was for injuries occurring by negligence of omnibus drivers, and one of each for injuries from collisions between Thames steamers; the injury being precisely the same in both, viz., the loss of a leg, resulting from exactly the same sort of accident, and on board of the same steamer. The only essential difference is in the names of the plaintiffs in the last of the two cases. The similarity almost raises a suspicion of mistake in reporting. But that is hardly possible. It is certain, however, that the Chief Baron makes no reference whatever to the decision of the Common Pleas on the point, made more than a year before.

In *Smith* vs. *Smith*, 2 Pick. 621, the ruling of the court was in accordance with the doctrine of *Thorogood* vs. *Bryan* and *Catlin* vs. *Hills*. So I find the same thing ruled in two cases in Ohio, *The Cleveland, Col. and Cin. Railroad* vs. *Terry*, 8 Ohio 570 (1858), and in *Puterbaugh* vs. *Reasor*, 9 Id. 484 (1859). So in *Brown* vs. *The N. Y. Cent. Railroad Co.*, 31 Barb. 385, referred to in the text of Redfield on Railways 333, as the law on the subject.

In *Chapman* vs. *New Haven Railroad Co.*, 19 New York Rep. 141, decided in the Court of Appeals (1859), a contrary doctrine was held, that the plaintiff might recover against a negligent company, although there was concurring negligence on the part of the train.

In *Colegrove* vs. *The Harlem Railroad Co. and the New Haven Railroad Co.*, in the Superior Court of the city of New York, reported in 6 Duer 382, both companies were joined in an action by the plaintiff for an injury resulting from a collision between their respective trains. The jury found that both were negligent, and the court entered judgment against both. The case was afterwards affirmed in the Court of Appeals, 6 Smith 492. But the precise question now under discussion was not noticed in the opinion of the Court of Appeals. The case turned on the question of joinder. It was insisted that both could not be joined unless the negligence was joint; but the point was overruled. Redfield has a note at page 333 referring to this decision, in which he says, "it is certainly opposed to principle upon the

point (of mutual negligence), and also upon the point of joinder of the two companies in one action. But the difficulty may be obviated by their code of practice."

This was doubtless so; for as the action was begun by complaint, it neither belonged technically to *trespass* nor *case*. If the suit had been brought in case, there would have been a difficulty on the trial on account of the different rules of responsibility existing between the defendants. The carrier-train would be answerable for the slightest negligence, and held to the exercise of the highest degree of diligence and care, while those in charge of the other train, as to the plaintiff, would be held only for the observance of ordinary care and diligence. Those principles however exist, let the form of action be as untechnical as it might, and hence I am not quite able to comprehend how the case could have been tried with any regard to logical or legal principles. It was contended by some of the judges in the Supreme Court, that the action must be regarded as a *trespass*, for the force directly applied without regard to any joint interest, and thus sustainable. Without stopping to point out difficulties in this view of the case, I have only further to remark, that the question of concurring negligence between those in charge of these two trains, and the effect of it, was not discussed in the Court of Appeals. We have, therefore, but one decision of that court in point, viz., *Chapman* vs. *New Haven Railroad Co.*, *supra*, and which seems to overlook the important element of concurring negligence of those in charge of the carrying vehicle, with the other party sued, and the consequence of it.

The Turnpike vs. *Stewart*, 2 Metc. (Ky.) 119, was the case of a passenger in a stage-coach, injured in passing the turnpike gate, owing to the negligence of the gatekeeper. The defence was negligence on the part of the driver in not having his lamps lit. The court said: "That if the injury was occasioned by the negligence of both (the driver and gatekeeper), the fault of one is no excuse for the other; both in that case are liable to the party injured." So the learned and generally accurate editors of Smith's Leading Cases, Vol. I., page 366, seem to think:—"it is inconceivable that each set of passengers should by a fiction be identified with the coachman who drove them, so as to be restricted for remedy to one against their own driver or employer." These are the authorities, English and American, outside of our state, and in which I think the clear preponderance is in favor of the

doctrine, that mutual negligence in case of an injury to a third party is a defence.

I have been able to find but one case in our own reports bearing on this point, viz., *Simpson* vs. *Hand*, 6 Wh. 311. That was an action for an injury to goods. The plaintiff had shipped goods on board the schooner Thorne, at anchor in the Delaware. She was run into in the night-time by the schooner William Henry, and the owners of the latter were sued for the damage done in consequence of the collision. The case was tried before KENNEDY, J., at *Nisi Prius*, who ruled that concurring negligence was no defence. On certificate to the Supreme Court, the case was reversed, *solely* on the ground of misdirection in this particular. GIBSON, C. J., in delivering the opinion of the court, cited *Vanderplank* vs. *Miller*, *supra*, and said, "The force of that decision is attempted to be evaded by supposing the owners to have been their own carriers, but nothing in the report gives color to such a supposition; the owners of both goods and vessel would scarce have brought their action for damages to the goods alone. This case, therefore, is in point, and though it was tried at *Nisi Prius*, the counsel seem to have been satisfied with the verdict." He cited also *Smith* vs. *Smith*, 2 Pick., *supra*. Further on he said: "The case put, of injury to a passenger from a collision of stagecoaches, wants the essential ingredient of bailment to complete the analogy; but I am not prepared to admit that even *he* could have an action for mutual negligence against any but him to whose care he had committed his person. A common carrier is liable to his employer at all events; and to make his associate in misconduct answerable for all the consequences of it, would make one wrongdoer respond in ease of another for injury that both had committed. *It is more just that the owner should answer to his employer, rather than one in whom the employer reposes no confidence.*" As Mr. Justice KENNEDY marked no dissent, we are to presume that he acceded to the views expressed by the Chief Justice.

The case is not precisely identical in principle with the one under discussion; the difference is noticed by the Chief Justice, but I conceive it is so strikingly analogous as to be authority. The difference consists only in the degrees of responsibility between carriers of passengers and common carriers of goods. The former are held to the exercise of the highest degree of care and skill, the latter only to a slight increase of responsibility;

the law defining the case for which he shall be exempt when loss has befallen the property in his charge, and making him answer for all the losses, however careful and prudent he may have been. The reason of the rule is the same in both cases. It is the policy of the law to insure safety as far as possible to both persons and property, when being carried or transported from place to place by public and common carriers. That can only be done by enforcing a strict rule of responsibility upon those who undertake such business.

I do not think, however, that the rationale of the principle that concurring negligence leaves the party to look to his own employer, is satisfactorily expounded in the opinions of the judges in *Thorogood* vs. *Bryan*, viz., the identity of the passenger with his own vehicle. I would say the reason for it is, that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier, as already noticed, from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is, that he shall be answerable for omitting *any* duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware, even, of the presence of a party who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than its opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on to another, which he would assuredly do, if the temptation and opportunity offered. As this view best accords with the policy of the law, it is proof of the existence of the rule itself.

If in this case there was no *contributory* negligence chargeable to those conducting the train, with which the cars in charge of the deceased were with himself being conveyed; in other words, if their negligence did not *directly* contribute to the disaster,

although there may have been negligence in a general sense, the defendants will be answerable, if the acts of their servants or agents were the *proximate* cause of it. The negligence on part of the train which would be a defence must be directly involved in the result; it must by itself or concurring with the defendants be the *proximate* cause of the death. For instance, running too rapidly on a road in bad repair, driving instead of drawing the train, would not abstractly be such negligence as would be a defence. To be such, the consequence of these acts or some of them, must have directly entered into and become active agents in the very disaster itself. This must be the rule of all such cases: 1 Sm. Lead. Cases 365.

Because this case was not put to the jury on the principles herein stated, the plaintiffs in error have sustained their exception, and we are constrained to send the case down for a re-trial, when doubtless they will receive the necessary consideration.

The error assigned upon the exception to the rejection of the offer of the testimony of an expert is entirely irregular; but as the case goes back, we will say, we think the testimony should have been received. What it may amount to is not for us to speculate about. In a case like this to be effectual to any extent, it must *tend* to show actual concurring negligence on part of the railroad train. Whether it will do so or not will be for the jury, under instructions from the court, to determine.

Judgment reversed, and *venire de novo* awarded.

I. The principle that he who to the injury of another neglects a duty that by law he ought to perform, is liable to compensate the injury, is as old as the common law. Yet it was not till the case of Butterfield *vs.* Foster, 11 East 60, in the Court of King's Bench, in 1809, that the important doctrine was distinctly announced, that notwithstanding the culpable negligence of the defendant, the plaintiff could not recover if there was concurrent negligence, or such want of reasonable care on his own part as contributed to the injury. No sooner, however, was this doctrine established than the courts seemed inclined to push it to an extreme, and it came to be held that almost any negligence of the plaintiff would prevent his recovery. The cases appear to have run in that direction until Bridge *vs.* Grand Junction Railway Co., 3 M. & W. 244, in 1838, in which the Court of Exchequer decided that though there may have been negligence on the part of the plaintiff, yet if it was not such as contributed to the injury, or if he could not with reasonable care have avoided the injury, he might recover. This case has been extensively cited and uniformly followed in England and the United States, and may therefore be considered to have established the law on the subject, though the true limitation, as remarked by Baron PARKE in this case, was

clearly implied in Butterfield *vs.* Foster, and had been enunciated more or less explicitly in numerous American cases: Wood *vs.* Waterville, 4 Mass. 422; Bush *vs.* Brainard, 1 Cowen 78; Smith *vs.* Smith, 2 Pick. 621; Noyes *vs.* Morristown, 1 Ver. 353; Harlow *vs.* Humiston, 6 Cowen 189; Lane *vs.* Crombie *et al.*, 12 Pick. 177.

II. A very interesting and much more doubtful question, however, is that raised and decided in the principal case; in the event of a collision of a public conveyance by concurrent negligence of the driver or conductor and a third person, by which a passenger is injured without any personal fault of his own, whether the passenger is so far identified with his own driver that he is barred in his action against the third party by his driver's negligence. This question naturally is of modern origin, and the few cases in which it has been raised are very thoroughly examined in the principal opinion, but the importance of the topic will justify us in adding a few observations.

1. The rule that has obtained in England and is adopted in the principal case, has been founded upon the decision in Vanderplank *et al. vs.* Miller *et al.*, 1 Mood. & Malk. 169. This case is reported very briefly, and it is noticeable that as has occurred in so many other instances, it appears to afford a very narrow foundation for the expanded doctrines that have been built upon it. The syllabus takes no notice of the ground that the plaintiff is barred by negligence of his carrier, it is "In an action for running down a vessel the plaintiff cannot recover unless the injury is attributable entirely to the fault of the defendants; if *he* were partly in fault but the defendants with care might have prevented the accident, he cannot maintain his action." The report shows that the crew of the vessel on which plaintiff's goods were had been negligent, but the important point for the present inquiry, the identity of the plaintiff and the crew, was assumed in the charge of the Chief Justice, and indeed throughout the case. The next case relied upon for the law of this subject is Bridge *vs.* Grand Junction Railway Co., 3 M. & W. 244, already cited. In this case also, it is not a little remarkable, that the identity of the plaintiff, who was a passenger, with the managers of his train is assumed without question; but it appears plainly from the report, and from the subsequent remarks of PARKE, B., in Davies *vs.* Mann, 10 M. & W. 546, that the point in this case was as to concurrent negligence, and the other question was not at all considered. In the next case, however, Thorogood *vs.* Bryan, 65 E. C. L. 115, which professed to be founded on those already cited, it was first explicitly determined that a passenger is so far identified with his carrier, that want of care on the latter's part will be a defence to an action by the former against the driver or owner of the carriage which directly caused the injury. And it is noticeable that this decision was notwithstanding the authority of Keating and Willes, the editors of Smith's Leading Cases (and both afterwards judges of this same court), who, in a passage cited in the argument of Cattlin *vs.* Hills, page 126, had put this very case as an "inconceivable" result of what might appear, on a hasty perusal, to be the doctrine of Bridge *vs.* Grand Junction Railway Co. (Smith's Lead. Cas. 132, *a*). The next cases are Rigby *vs.* Hewitt, 5 Exch. 240, and Greenland *vs.* Chaplin, Id. 243, in which we think the same doctrine is substantially enunciated, though by no means so explicitly as in Thorogood *vs.* Bryan. The former was a case arising out of a race between two omnibuses, but it appeared that the

proximate cause of the injury was the defendant's negligence, though the plaintiff's own driver was going at a pace that might have constituted negligence in a general sense, and the case therefore was well decided on that ground. In the latter case the facts are very similar indeed to Cattlin *vs.* Hills, argued with Thorogood *vs.* Bryan, but the decision is reconcilable with the last-named case, and as the latter was cited by *Humfrey* (*arguendo*, p. 245), the court would never have passed over it in silence if they had intended to overrule it. We are disposed, therefore, to consider the cases as consistent, though Mr. Justice THOMPSON very frankly concedes their apparent repugnancy, and they have not been considered by the profession in England as entirely in harmony.

These are the English cases directly upon the point, and they appear to be authoritative though they have not yet been entirely acquiesced in, as appears from Tuff *vs.* Warman, 89 E. C. L. 750, where WILLIAMS, J., alludes without disapproval to the "damaging remarks" of the editors of Smith's Leading Cases on Thorogood *vs.* Bryan, and from Waite *vs.* N. E. Railway Co., 96 E. C. L. 725, where Thorogood *vs.* Bryan is criticised in the argument, and Lord CAMPBELL says: "we do not consider it necessary to offer any opinion as to the recent cases," &c., showing that had the case then in their hands called for a decision on the point, the court would at least have heard an argument against Thorogood *vs.* Bryan and its kindred cases.

2. In the United States the question does not seem to have been explicitly determined until the present case, except in the states of New York and Kentucky. In New York the decisions of the various courts have been conflicting. In Knapp *vs.* Dagg, 18 Howard Pr. Rep. 165, a case tried at Nisi Prius, in 1857, before BALCOM, J., of the Supreme Court, it is said that the passenger injured may have his action against either of the wrongdoers, and that negligence of his own driver is no defence to his action against the other. In the same year the Superior Court of New York, in Colegrove *vs.* Harlem Railroad Co. *et al.*, 6 Duer 382, held that the passenger may sue both the colliding companies jointly, and this was affirmed on appeal, DENIO, C. J., dissenting, 20 N. Y. 492, though the principal question discussed in the Court of Appeals was the propriety of a joint action. In Brown *vs.* New York Central Railroad Co., 31 Barbour 385, however, the Supreme Court explicitly adopted the English doctrine on the authority of Thorogood *vs.* Bryan, and JOHNSON, J., says he is satisfied that the decision in Knapp *vs.* Dagg is not law. But in Chapman *vs.* New Haven Railroad Co., 19 N. Y. 341, the Court of Appeals expressly rejected the authority of the English cases, and held that a passenger is not identified with his carrier, and may maintain his action against the other train, though the carrier-train may have been guilty of such negligence as would have barred its action. This must therefore be taken as the present law of New York.

In Kentucky the only case touching the point is Danville, &c., Turnpike Co. *vs.* Stewart, 2 Met. (Ky.) 119, in which the Court of Appeals say, "where an injury is occasioned by the negligence of two persons, the fault of one is no excuse for that of the other. Both, in that case, are liable to the party injured." No notice, however, is taken of the doctrine that the plaintiff is barred by the negligence of his carrier; nor are any of the cases cited, though the facts involved that very point.

In Pennsylvania the only analogous case is Simpson *vs.* Hart, 6 Wh. 311,

which is fully examined in the opinion before us, and we, therefore, only add that the principles on which it was decided, appear to tend strongly to the conclusions of the court in the present case.

It will be seen, therefore, that in nearly all the states the question is still an open one, and notwithstanding the careful consideration it has received, especially in Thorogood *vs.* Bryan and in the present case, we cannot regard the argument on either side as exhausted. The English, and as we may now call it the Pennsylvania doctrine, has undoubtedly the strongest basis on technical grounds, and as following the tendencies of ancient decisions, but it may be seriously questioned, whether, in the altered circumstances of modern travel, the legal principles by which the older cases were decided ought to apply with the same force. Certainly nothing could be more unsatisfactory than the ground assumed as the basis of decision in Thorogood *vs.* Bryan, that the passenger is to be identified with his carrier by reason of any technical "special confidence" which he exhibits by his choice of that mode of conveyance. The whole modern system of travel and intercommunication is at variance with any such idea. The doctrine of the case, therefore, receives a very material accession of strength from the principle, that "it better accords with the policy of the law to hold the carrier alone responsible, as an incentive to care and diligence," now first enunciated in the able opinion of Mr. Justice THOMPSON as the basis of the decision. Whether this consideration is important enough to justify the narrowing of the remedy to which the innocent party injured would appear to be naturally entitled, against either or both of the wrongdoers, we must still regard as open to question.

And it is not improbable that the Supreme Court of Pennsylvania may yet be called upon to examine, how far the principles of the present case are in harmony with those upon which their recent decision in Painter *vs.* City of Pittsburgh (3 Am. Law Reg. N. S. 350) was founded. Says Mr. Justice STRONG in the latter case, "It is difficult to discover any substantial reason of good policy for holding the present defendants responsible to the plaintiff. *The negligence complained of was not theirs.* It does not appear that they knew of it. The verdict determines that the fault was all that of the contractors. *Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants—neither servants nor agents.* They were in an independent employment, and sound policy demands that in such a case the contractor alone should be held liable." The same principle would undoubtedly protect a passenger from an action for the negligence of a railroad company in whose cars he was travelling, and if the company's negligence is not his, so as to subject him to an action therefor, it is not easy to see why it should be his so as to bar him from an action against a wrongdoer which he would otherwise have had. But it may be that the cases can be harmonized on the basis indicated by Mr. Justice THOMPSON, an imperative policy of the law requiring the carrier alone to be responsible as an incentive to care and diligence. J. T. M.